Supreme Court, U.S.
FILED

02 10 41 JAN - 6 2003

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH B. GOLDING,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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134 pp

QUESTIONS PRESENTED

1. Whether petitioner, who was found by the U.S. Court of Federal Claims to have been illegally discharged as a midshipman at the U.S. Naval Academy, is entitled to be restored to active duty in the same rank and status he held at the time of the illegal discharge.

2. Whether, in the alternative, petitioner, who was awarded back pay by the U.S. Court of Federal Claims for the time period from the date of his illegal discharge to the date his class graduated from the U.S. Naval Academy, is entitled under 28 U.S.C. §1491(a)(2) to the correction of his military records to reflect that he is a graduate of the U.S. Naval Academy.

3. Whether petitioner should have been treated as an officer with an indefinite term of service, rather than as an enlisted person with a definite term of service, for purposes of fashioning relief after the lower courts found that he had been illegally disenrolled from the U.S. Naval Academy and illegally discharged from the U.S. Navy.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Kenneth B. Golding, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Federal Circuit, entered in the above proceeding on October 8, 2002

OPINION BELOW

The per curiam opinion of the court of appeals (App., *infra*, 1a) is not reported. The opinion of the U.S. Court of Federal Claims (App., *infra*, 3a-108a) is reported at 48 Fed. Cl. 697 (2001).

JURISDICTION

The opinion of the court of appeals was entered on October 8, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Title 28, United States Code, §1491 (a) (2), which provides, in pertinent part:

To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

STATEMENT OF THE CASE

Kenneth B. Golding, hereafter referred to as the "petitioner", brought suit on March 22, 1995 in the U.S. Court of Federal Claims. Petitioner alleged that his

involuntary disenrollment from the United States Naval Academy and his Honorable Discharge from the U.S. Navy, effective March 27, 1989, on grounds of "physical disability" were illegal. The U.S. Court of Federal Claims granted petitioner's motion for summary judgment and held that petitioner had been illegally disenrolled and discharged. The court found that the U.S. Navy had failed to follow Navy directives in the disenrollment and discharge of petitioner. App. 102a-106a. The Navy Surgeon General (the highest-ranking Navy medical official) had failed to review petitioner's records and make a determination prior to disenrollment and discharge concerning whether petitioner was medically able to continue as a student at the U.S. Naval Academy and/or to be commissioned. See 103a-107a.

The sole relief that the federal claims court awarded to petitioner was back pay and allowances in the amount of $1,650. This amount represented three months of pay from the date of petitioner's illegal discharge on March 27, 1989, to the date petitioner's Class of 1989 graduated from the U.S. Naval Academy, on or about May 31, 1989. Despite petitioner's requests that his records be corrected to award him a diploma, or that in the alternative, he be restored to active duty, the U.S. Court of Federal Claims granted no other relief. App. 108a-110a. The U.S. Court of Appeals for the Federal Circuit, after oral argument, affirmed per curiam the decision of the U.S. Court of Federal Claims.

The essential facts are not in dispute. In 1985 petitioner was appointed by the President of the United States to serve as a midshipman at the U.S. Naval Academy. See 10 U.S.C. §§ 6953, 6954. Petitioner served on active duty in the Navy as a midshipman from July 2, 1985 until March 27, 1989, the date of the illegal discharge. At the time of discharge, petitioner was in his First Class year (the fourth

academic year), and was 17 credit hours short of graduation. Also at the time of discharge, petitioner's duty status was "Subsisting at Home", a type of Naval convalescent leave.

Prior to being disenrolled and discharged, petitioner objected and put the Navy squarely on notice that his desire was to recuperate from his disability, return to the U.S. Naval Academy, graduate and pursue a naval career. Petitioner submitted a written rebuttal to the findings of the medical board in his case. Included in this rebuttal were three alternatives petitioner suggested that would have allowed him to recuperate and then return to the U.S. Naval Academy and graduate. App. 88a-89a. The medical board never provided to petitioner any reasons why his suggestions could not be implemented. Instead, the medical board stated: "The patient's rebuttal has been reviewed. There are no changes in the findings or recommendations of the Board." App. 90a. Nowhere does the administrative discharge record provide any reasons given by any Navy officials as to why petitioner could not or should not be allowed to recuperate and return to the U.S. Naval Academy and continue his career. To the contrary, at the highest levels in the discharge process U.S. Navy officials acknowledged the petitioner's medical condition at time of discharge was "resolving", yet disenrolled and discharged him anyway. App. 103a, 104a.

Between the date of his illegal discharge on March 27, 1989 through at least 1994, petitioner wrote to Congressmen and Senators, and to U.S. Naval Academy officials seeking reinstatement as a midshipman at the U.S. Naval Academy. He was turned down. See, *e.g.*, App. 112a, 113a.

In March 1995 petitioner filed suit in the U.S. Court of Federal Claims. Among other things, he alleged that his discharge was illegal and therefore void. The Complaint

stated, *inter alia*:

> 49. Following his Honorable Discharge from the U.S. Navy, on numerous occasions Plaintiff has requested of U.S. Navy officials that he be allowed to return to the U.S. Naval Academy and complete the course of instruction but U.S. Navy officials refuse to allow Plaintiff to be readmitted.
>
> 52. Plaintiff believes and therefore avers that he is entitled to back pay and allowances for the period from March 27, 1989, to the present and continuing, and to be restored to active duty and accorded any and all other rights and privileges as appropriate under law, to include his being a midshipman at the U.S. Naval Academy, or alternatively to be granted his diploma.

As of March 27, 1989, the date of petitioner's illegal discharge from the military service, petitioner had earned and held the following rank, position and status:

a) Petitioner was on active duty in the U.S. Navy; App. 18a, 55a. 58a.

b) He was a midshipman in the Naval Service; See App. 36a, 46a, 55a, 58a.

c) He held the rank of Midshipman First Class, that is, he had advanced to his fourth year at the Naval Academy; See App. 33a.

d) He was only 17 credit hours short of graduation

with a Bachelor of Science degree in Political Science, and 27 credit hours short of graduating with an honors degree. See App., 88a, 103a.

e) He had been found by Navy doctors to be suffering from a physical disability, which had never been reviewed by the Navy's Surgeon General to determine petitioner's medical fitness to continue as a student at the U.S. Naval Academy and/or to be commissioned in the U.S. Navy. See App. 103a-106a.

f) Petitioner was being paid basic pay and allowances as a midshipman in accordance with 37 U.S.C. 203(c), which provides that a midshipman's pay is 35% of that of an ensign (0-1). Petitioner's pay at time of discharge was approximately $550/month, See App. 44a.

g) Petitioner was in a "Subsistence at Home" (SAH) status, a form of Naval convalescent leave. See App. 30a, 61a, 87a; 113a.

In solely granting petitioner three months of pay and allowances, the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit, did not make petitioner whole. As grounds for denying petitioner ancillary relief in the form of awarding him a diploma, the Court of Federal Claims found that Orloff v. Willoughby, 345 U.S. 83 (1953) and its progeny barred this relief. App. 109a; See also 94a. Furthermore, the Court of Federal Claims held that petitioner's situation was analogous to that of an enlisted man in having a definite term of service, that petitioner's term of service ended when his class graduated, and that therefore he was not entitled to any pay beyond the graduation date of the class of 1989. App. 44a-48a. The Court also did not order ancillary relief in the form of restoring petitioner to active

duty. The U.S. Court of Appeals for the Federal Circuit affirmed per curiam the lower court's decision without opinion. App. 1a-2a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE WHETHER ORLOFF v. WILLOUGHBY, 345 U.S. 83 (1953), BARS A LITIGANT WHO HAS BEEN AWARDED A MONETARY JUDGMENT IN A MILITARY PAY CASE FROM OBTAINING ANCILLARY RELIEF PERMITTED BY 28 U.S.C. §1491(a)(2).

In the present case, the lower court held that petitioner was not entitled to the correction of his military records to reflect that he received a degree from the U.S. Naval Academy because Orloff v. Willoughby, 345 U.S. 83 (1953) and its progeny precluded such relief. App. 109a, See also App. 94a. Petitioner, however, had prevailed under the Tucker Act, 28 U.S. Code §1491, and was not afforded complete relief by obtaining a money judgment. But for the illegal acts of the respondent, petitioner would have graduated from the Naval Academy and pursued a career in the Navy.

A provision of the Tucker Act, namely 28 U.S.C. §1491(a)(2), provides for relief ancillary to a money judgment "to provide an entire remedy and to complete the relief afforded by the judgment." Section 1491(a)(2) specifically allows the court to "issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records. . ." By raising the Orloff decision as a bar to any additional relief in the present case, the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit eviscerated the

statute and thwarted the intent of Congress in providing for ancillary relief.

Congress expressly enacted 28 U.S. Code §1491(a)(2) in order "that aggrieved civilian employees and military service personnel could obtain full and adequate relief in a single action brought in the Court of Federal Claims." Walker v. United States, 1998 U.S. Dist. LEXIS 14929 (E.D. Louisiana 1998), quoting from S. Rep. 1066, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 3116 (emphasis added.).

The Senate Report pertaining to 28 U.S. Code §1491(a)(2) specifies as follows:

> A[n] ... important classification where the present limits on the remedies available in the Court of Claims imposes unwarranted burdens on the litigant is in cases involving military personnel. Those generally are monetary claims which are based on retirements in an improper status, such as failure to award disability retirement pay or retirement in proper rank. Some of the cases are also based on an improper dismissal from the service. In those cases, the Court of Claims can grant a monetary judgment but cannot alter the serviceman's military status. This bill would permit the court to grant such military personnel relief collateral to and consistent with the judgment.

S. Rep. 1066, 92d Cong., 2d Sess. Reprinted in 1972 U.S. Code Cong. & Admin. News, 3116, at 3118-9.

It has been long-standing, settled law that the basic goal to be achieved in military pay cases is as follows:

> Judicial relief provided to military servicemen who have been wrongfully discharged from service 'has been premised upon one central principle: making the injured men 'whole'. Courts attempt to return successful plaintiffs to the position that they would have occupied 'but for' their illegal release from duty.'

Christian v. United States, 49 Fed. Cl. 720, 725 (2001), quoting from Dilley v. Alexander, 627 F.2d 407, 413 (D.C. Cir. 1980).

The relationship of Orloff, supra, and its progeny to the Tucker Act provisions for ancillary relief, 28 U.S. Code §1491(a)(2), is an issue of national significance. It affects all members and former members of the armed forces who have claims under the Tucker Act, because the holdings of the lower courts in the present case foreclose ancillary relief despite the statute allowing such relief. It is hard to envision a case in which the government could not argue that ancillary relief would invade military discretion under Orloff. If Orloff is a bar to granting a judicial remedy other than a money judgment, there is virtually no case in which ancillary relief can be granted, and therefore successful military pay litigants can not be made whole.

Furthermore, the United States Court of Federal Claims and the Court of Appeals for the Federal Circuit are the only courts, other than the Supreme Court, that have jurisdiction to hear cases under the Tucker Act. These lower courts have now spoken on the issue. Therefore it is only the Supreme Court that can clarify the impact of Orloff on the Tucker Act's provision for ancillary relief.

II. THIS COURT SHOULD RESOLVE WHETHER A MIDSHIPMAN IS AN OFFICER OR IS AN ENLISTED PERSON FOR PURPOSES OF MILITARY PAY CASES.

In the present case, the lower courts treated petitioner as if he had been, at the time of his illegal discharge, an enlisted person with a fixed term of service, rather than an officer[1] with no fixed term of service. In so holding, the courts decided that petitioner's term of service ended on the date his Naval Academy class graduated. Therefore, the amount of back pay and allowances petitioner received was only to the date of the graduation of his class at the Naval Academy. This holding also provided the basis for the courts to fail to reinstate petitioner as a midshipman at the Naval Academy, as his term of service was construed to have ended when his class graduated.

If the lower courts had treated petitioner as an officer, there would have been a far different result. See, *e.g.*, Groves v. United States, 47 F. 3d 1140 (Fed. Cir. 1995); Doyle v. United States, 220 Ct. Cl. 285, 307 (1979) (unlawfully discharged officers "[are] entitled to their position, rank, and pay until they were terminated from active duty under proper authority."; Winchell v. United States. 28 C. Cls. R. 30 (Ct. Cl. 1892) (an illegal order of discharge or dismissal is void and has no effect upon the status of the officer, except to put him upon waiting orders.) Petitioner's pay and allowances would have continued until he was legally discharged, which has not happened to date; and he would have been reinstated as a midshipman, in the same rank, position, and status that he

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1. The Naval Academy handbook, entitled Reef Points 1985-1986 (80th Ed.), distributed to petitioner, contains a section entitled "Oath of Office for Midshipmen Candidates." The section states: "... you have been appointed a Midshipman in the United States Navy. You are now a member of the United States Armed Services, and as such are subject to its rules and regulations. Furthermore, you are already an officer, a junior officer yes, but nevertheless, an officer." (Emphasis added.)

held at the time of his illegal discharge. That rank, position and status are described above at pages 5-6, infra, (a) through (g).

Over one hundred years ago this Court decided two cases which concerned whether midshipmen were officers or enlisted personnel within the context of specific statutes. United States v. Baker, 125 U.S. 646 (1888); United States v. Cook, 128 U.S. 254 (1888). In Cook, this Court stated: "That a midshipman is an officer has been understood ever since there was a navy. He is not one of the common seamen..." Id. at 256. In Baker the Supreme Court also held that a midshipman is an officer.

In the present case, the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit did not follow these Supreme Court cases.

The granting of certiorari in this case would allow this important issue to be revisited and would resolve the question in the 21st Century as to whether a midshipman is an officer or is an enlisted person for purpose of obtaining relief pursuant to the Tucker Act.

The very fact that the Supreme Court has in the past granted certiorari to determine the legal status of a midshipman tends to show the importance of this issue. Moreover, a decision on this issue by this Court would be applicable to students at the U.S. Military Academy and the U.S. Air Force Academy, as well as to students at the U.S. Naval Academy.

III. THE DECISIONS OF THE COURTS BELOW ARE INCORRECT.

The decisions of the U.S. Court of Appeals for the Federal Circuit and of the U.S. Court of Federal Claims are incorrect for the above stated reasons.

CONCLUSION

The petition for a writ of certiorari should be granted. Petitioner has suffered a great injustice in having had his military education and career destroyed by the illegal action of the respondent. A fair, appropriate, and legal resolution of this case would be for a court to order petitioner restored to active duty in the same rank, position and status as outlined above, pages 5-6, infra, a through g. This would allow Naval officials to evaluate petitioner as appropriate, and should petitioner be found medically fit, allow petitioner to complete his studies and graduate from the U.S. Naval Academy, be commissioned, and pursue a military career.

In the alternative, petitioner's records should be corrected to reflect that he is a graduate of the U.S. Naval Academy.

Respectfully submitted,

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